



**SIGMA**

**Support for Improvement in Governance and Management**

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**BOSNIA AND HERZEGOVINA**  
**DEMOCRACY AND THE RULE OF LAW**  
**ASSESSMENT MAY 2009**

## Democracy and the Rule of Law

The economic situation and consequent fiscal difficulties will have a negative impact on the timing and feasibility of Public Administration Reform (PAR) actions. The authorities may rely more heavily on donor funds to pursue PAR activities, thus making donor co-ordination even more necessary.

The common, deeper reason for major deficiencies in the governance system is the lack of respect towards the law and democratic institutions by major actors, whether they be parliament, the executive or the judiciary, or civil society and its organisations. This is a matter of democratic and legal culture. The international community, which itself sometimes overrides constitutional constraints in order to pursue political objectives, should cease promoting legal and managerial solutions that do not fit the stage of development of the institutions that exist in BiH. Some partial solutions to problems may undermine the rule of law and make current tensions more acute.

The international community should co-ordinate better its efforts to ensure a coherent style throughout the legal framework, to make it comprehensive, consistent and transparent. The legal tradition derives from continental European law; there is now a mixture of legal styles from various continental as well as common law traditions. The incompatibilities amongst different laws and legal styles have weakened consistency, accountability and enforcement. They provide scope for subjective interpretation of law, while leaving some parts of the governance framework unregulated. The different legal styles create inconsistent and inappropriate institutions and hinder the development and understanding of democracy, professionalism, transparency, and accountability.

## Constitution

The Dayton constitutional set-up was decisive in ending the war on the BiH territory, but deprived local politicians of responsibility and real accountability, as these were assumed by the international community, mainly through the OHR (article 5 Annex X of the General Framework Agreement). Moreover, this set-up is an unsuitable basis for an effective democratic state, as it pre-empted the possibility of creating a sufficiently empowered central state, while enshrining an ethnic and religious-based polity. Furthermore, the current Constitution has generated an extraordinary and unmanageable collection of legal orders with 14 governments, including the State, the Federation, Republika Srpska (RS) and the cantons (not counting Brcko). The constitutional system distributes veto rights widely amongst political actors and over numerous “veto points” on a multiplicity of so-called “vital national<sup>1</sup> interests”. The system is inimical to rational decision-making and prevents the emergence of a habit of political compromise, which is inherent to any democratic regime. The State has, in reality, almost no power to modify the power sharing arrangements, which are protected by the international community. An assessment of the effectiveness of the functioning of the State cannot be decoupled from an assessment of the functioning of the international community, its capacities, and the checks and balances under which it operates.

## Parliament

The legislative function of the Parliaments is directly affected by the weaknesses of the Constitution, and the weak professional policy capacities in both the international community and the governments. The religiously and ethnically based distribution of parliamentary seats, based on 1991 census data and recurrent ethnic-based voting by the electorate, not only reduces the Parliaments’ public legitimacy, but also their ability to contribute solutions to the actual problems affecting the country: poverty, unemployment, ethnic and religious hatred and a dysfunctional public administration and other institutions.

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<sup>1</sup> Meaning Bosniak, Croat or Serb communities.

## Government

The system of multiple governments with radically opposed political agendas is aggravated by the weak influence and power of the central institutions of the State. Recently, a common approach to the management of government policy-making has been developed by the Governments' Secretaries-general, which offers some hope of change.

## Public Administration

The public administration is overall characterised by its ineffectiveness at the State level, by its politicisation in RS and FBiH, and by its wastefulness in the whole country. The notion of public management – which means skills, authority, responsibility and accountability – is not understood, while the politicisation of public offices is rife and the staff are under-qualified.

The three laws on administrative procedures need to undergo a thorough review in order to be harmonised or better unified and adapted to general European principles, in particular with regard to transparency, guaranteeing the hearings of the parties, legal certainty, and discretion. Special administrative procedure laws will have to be reduced to the absolute minimum.

The establishment by law of the Fiscal Council has potential to improve fiscal policies and co-operation between the common institutions and the entities. Nevertheless, the lack of co-ordination between the different levels of government in the budget-setting process (e.g. agreement on appropriate fiscal parameters) and the budget execution level (e.g. lack of co-ordination in the development of treasury systems), together with weak budget planning and management capacities at all levels, seriously weakens the system.

New laws on internal audit have been published and Public Internal Financial Control (PIFC) policy papers are being drafted. The introduction of PIFC may be inhibited by the lack of delegation of responsibilities and understanding within public organisations. The overall PIFC system shows unbalanced development. External audit has developed strongly at the technical level (supported by SIDA), but this has had limited impact on the reality of the budget execution and the overall PIFC system show unbalanced development. The supreme audit institutions (SAIs) have no constitutional standing and their reports are not fully used by the Parliaments. External audit has developed strongly at the technical level, but this has had limited impact on the reality of budget execution.

The public procurement reform has been stalled for a number of years<sup>2</sup>. The regulation of concessions and public-private partnerships (PPPs) is worrisome.

BiH has participated in all steps of the creation of ReSPA since 2006, but it has not signed the international agreement.

## Judiciary

### *Administrative Justice*

No legal certainty can be guaranteed in a country where there is no supreme judicial instance empowered to unify legal doctrine and impose its legal interpretation on lower courts. The organisation of administrative justice needs to be done country-wide and needs to be established as a clearly designed hierarchy of courts. The current set-up for administrative justice is unfit to guarantee that the various existing administrations will abide by the rule of law. A countrywide unified law on administrative justice is needed, which endows administrative courts with full jurisdiction and creates better instruments to oblige administrative authorities to “refer the file” to the court and to ensure more effective enforcement of administrative court rulings pronounced against public authorities.

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<sup>2</sup> This situation changed after the visit of US Vice-President Biden. An update will be provided.

## **Anti-corruption Policy**

Corruption is widespread in all public administrations. The most commonly-cited cases refer to public procurement, which is reported as one of the main sources of semi-legal or illicit revenue for civil servants and officials. Privatisation is another major source of corruption, mainly involving politicians, not civil servants. Health care and higher education are also fields where bribery is commonplace.

All strategies and action plans that have been adopted to improve the integrity system of the country have generally ended in failure. The main reasons stem from a primarily donor-driven approach to anti-corruption, lack of institutional accountability, weak institutional co-operation, and failing political will, despite the fact that BiH has ratified many international conventions on anti-corruption.

**The implementation of another strategy, for 2006-2009, to fight against organised crime and corruption was reviewed by the Council of Ministers of the common institutions in September 2008. There seems to be a lack of co-ordination, monitoring and supervision, which, coupled with inconsistent goals, could lead to failures in implementation.**